(2)

No. 04-758

IN THE

Supreme Court of the United States

SOLOW BUILDING COMPANY, LLC,

Petitioner,

v.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the New York State court which reviewed an arbitration award under the "manifest disregard of the law" standard observe the standard of review required by the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Morgan Guaranty Trust Company of New York ("Morgan") merged in 2001 into a corporation now known as JPMorgan Chase Bank, N.A. and Morgan no longer exists.

JPMorgan Chase & Co. is the only publicly held company that owns 10% or more of the stock of JPMorgan Chase Bank, N.A.

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Cases:

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lv. denied, 99 N.Y.2d 511, *cert. granted*,
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Wien & Malkin LLP v. Helmsley-Spear, Inc.
783 N.Y.S.2d 339 (N.Y.A.D. 1st Dep't 2004) . . . 3, 4, 5

STATEMENT OF THE CASE

Petitioner, having lost an arbitration, now seeks to overturn the award, claiming that there was a "manifest disregard of the law." However, the New York courts below explicitly found that there had been no "manifest disregard of the law" and therefore there is no basis for granting certiorari.

This case concerns an arbitration over a rent escalation clause in a twenty-five year lease between petitioner and respondent. Respondent, Morgan Guaranty Trust Company of New York, a New York corporation, leased Manhattan office space from petitioner, also a New York entity. After the parties argued and briefed all relevant law and facts, the arbitrators awarded respondent $519,864 of its total claim for $1,289,565.

Petitioner asked the New York Supreme Court to vacate the award, claiming that the award was in "manifest disregard of the law." On February 26, 2003, the New York Supreme Court confirmed the arbitration award in its entirety. In its decision, that court analyzed the "manifest disregard" standard and held that the arbitrators' decision was "not shown to be either irrational or in manifest disregard of the law." (A. 8a).

Petitioner appealed to the New York Appellate Division, First Department, renewing its argument about a purported manifest disregard of the law. At oral argument, the five-judge panel questioned counsel for both petitioner and respondent about whether the arbitration award was in manifest disregard of the law. In its unanimous decision on April 29, 2004, the Appellate Division found petitioner's argument about manifest disregard of the law unavailing. (A. 2a).

For a third time, petitioner questioned whether the arbitration award was in manifest disregard of the law in a motion seeking leave to appeal to the New York Court of Appeals. The Court of Appeals denied leave to appeal on September 2, 2004. (A. 14a).

During the pendency of the appeals in this matter, this Court decided *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003), and remanded *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *lv. denied*, 99 N.Y.2d 511, *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003), for proceedings consistent with the *Citizens Bank* opinion. Nevertheless, in its subsequent appeals to the New York Appellate Division and the New York Court of Appeals, petitioner never argued that this matter should be governed by the Federal Arbitration Act or by this Court's decisions in *Citizens Bank* or *Wien & Malkin*, and petitioner did not move to renew its motion to vacate based on a change in law until November 23, 2004.

REASONS FOR DENYING THE PETITION

New York State Court Decisions Are Consistent with this Court's Decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin v. Helmsley-Spear, Inc.*

Certiorari should be denied because there is no conflict between the decisions of the New York courts and this Court. New York courts have been applying the Federal Arbitration Act's "manifest disregard of the law" standard of review of arbitration awards in arbitrations both within and outside the context of the Federal Arbitration Act, in accord with this Court's decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin LLP v. Helmsley-Spear, Inc.* Moreover, in the case at hand, the

New York courts explicitly reviewed the arbitration award under both the "manifest disregard" standard as well as the New York "totally irrational" standard – even though petitioner never raised the issue of whether the Federal Arbitration Act governed this arbitration.

This Court held in *Citizens Bank v. Alafabco, Inc.* that the Federal Arbitration Act governs arbitrations where the transaction at issue "affect[s] commerce" whether or not there is a "substantial effect" on interstate commerce. 539 U.S. 52, 56, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46, 51 (2003). Subsequently, this Court remanded *Wien & Malkin LLP v. Helmsley-Spear, Inc.* to the New York Appellate Division, First Department for proceedings consistent with *Citizens Bank* – specifically, to determine: (a) whether the transaction at issue "affected commerce" thereby mandating application of the Federal Arbitration Act; and (b) if it did affect commerce, whether the arbitration award met the "manifest disregard of the law" standard of review under the Federal Arbitration Act. 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *lv. denied*, 99 N.Y.2d 511, *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003).

Petitioner's reliance on *Wien & Malkin* is misplaced because the arbitration award in this matter has already been reviewed under the "manifest disregard of the law" standard by all levels of the New York courts. In *Wien & Malkin*, the arbitration award had not been previously reviewed pursuant to the Federal Arbitration Act standard and on remand the sole issue addressed by the New York Appellate Division was whether the arbitration award manifestly disregarded the law. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339, 340-41 (N.Y.A.D. 1st Dep't 2004).

In contrast to *Wien & Malkin*, the issue of whether the award in this case was in manifest disregard of the law was briefed by both parties before all levels of the New York courts. Although petitioner never previously argued that the Federal Arbitration Act governed this arbitration – and, unlike *Wien & Malkin*, respondent rejects petitioner's contention that the Federal Arbitration Act applies to this matter – petitioner did argue that the award should be reviewed under the "manifest disregard of the law" standard, which had been applied in prior New York cases. The New York decisions then relied upon by petitioner had applied the "manifest disregard" standard to arbitrations both within and outside the Federal Arbitration Act context. *See, e.g., Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 113 (N.Y.A.D. 1st Dep't 2003); *In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, Inc.*, 294 A.D.2d 245, 246 (N.Y.A.D. 1st Dep't 2002). *See also Matter of Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 180 (1995) (stating that where the Federal Arbitration Act applies, the arbitration of disputes is governed by the Federal Arbitration Act and not a contractually-binding state law to the extent it conflicts with the Federal Arbitration Act). Accordingly, New York state courts are not in conflict with this Court regarding the applicability of the "manifest disregard" standard of review to arbitrations governed by the Federal Arbitration Act.

Indeed, in the instant case, the New York courts reviewed the award under the manifest disregard standard and confirmed the award. The court of first impression, the New York Supreme Court, described the manifest disregard standard and its requirement that the "law allegedly ignored 'was well defined, explicit and clearly applicable to the case'" and concluded that:

> it is not shown that the arbitrators overtly disregarded any legal authority, or that the proposition for which

> [petitioner] Solow advocates is as well-defined and clearly established as it suggests. The arbitrators' decision to award Morgan some portion of its claim *is not shown to be* either irrational or *in manifest disregard of law.*

(A. 8a) (emphasis added).

On appeal, the New York Appellate Division, First Department, also reviewed the award under the manifest disregard standard. Unanimously, the Appellate Division held that application of the manifest disregard standard would not alter the Court's decision to confirm: "It does not avail landlord to argue that the award manifestly disregards the injunction, as well as this Court's decision in *Sage Realty Corp. v. Omnicom Group*, 278 A.D.2d 57, and therefore must be vacated." (A. 2a). New York's highest court, after reviewing petitioner's brief seeking to appeal based on "manifest disregard," denied the motion for leave to appeal. (A. 14a)

Thus, unlike *Wien & Malkin*, the arbitration award in this matter has already been reviewed under the "manifest disregard of the law" standard by all levels of the New York courts. Regardless of whether the Federal Arbitration Act governs, the New York courts have already tested the award according to the Federal Arbitration Act standard and have found no manifest disregard of the law.

The Issue of Whether the Federal Arbitration Act Governs Was Not Preserved For Review

Furthermore, the issue of whether the Federal Arbitration Act governs the review of this award was not properly preserved for review by this Court. As this Court recently noted, "[w]e ordinarily do not decide in the first instance issues not decided below." *Cooper Indus. v. Aviall Serv.*, 73 U.S.L.W. 4041, 2004 LEXIS 8271, *22 (Dec. 13, 2004); *see also Glover v. United States*, 531 U.S. 198, 205, 121 S. Ct. 696, 701, 148 L. Ed. 2d 604, 612 (2001) (stating that "[i]n the ordinary course we do not decide questions neither raised nor resolved below").

After this Court's decisions in *Citizens Bank* and *Wien & Malkin*, which expanded the applicability of the Federal Arbitration Act, petitioner failed to argue in any of its subsequent appeals below that the Federal Arbitration Act applied to this case.

CONCLUSION

The applicability of the Federal Arbitration Act is moot because the New York courts below did apply the "manifest disregard of law" standard in reviewing the arbitration award. Moreover, the petition is not ripe because petitioner omitted to argue the applicability of the Federal Arbitration Act in any court below.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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